Issue: Administrative Review of Hearing Officer's Decision in Case No. 10759; Ruling Date: July 12, 2016; Ruling No. 2016-4369; Agency: Department of State Police; Outcome: AHO's decision affirmed.

COMMONWEALTH of VIRGINIA
Department of Human Resource Management
Office of Employment Dispute Resolution

ADMINISTRATIVE REVIEW

In the matter of the Virginia State Police
Ruling Number 2016-4369
July 12, 2016

The grievant has requested that the Office of Employment Dispute Resolution ("EDR") at the Department of Human Resource Management ("DHRM") administratively review the hearing officer's decision in Case Number 10759. For the reasons set forth below, EDR will not disturb the hearing decision.

FACTS

The grievant was employed by the Virginia State Police ("agency") as a First Sergeant.[1] On October 16, 2015, the grievant was issued two Group II Written Notices for failure to follow instructions and/or policy, a Group I Written Notice for inadequate or unsatisfactory job performance, and a Group III Written Notice for engaging in conduct that undermines the agency's effectiveness or efficiency.[2] In conjunction with the Written Notices, the agency transferred and demoted the grievant and reduced his pay.[3] The grievant timely initiated a grievance to challenge these disciplinary actions, and a hearing was held on May 5, 2016.[4] In a decision dated May 25, 2016, the hearing officer rescinded the Group I Written Notice and one of the Group II Written Notices, but upheld the other Group II Written Notice, the Group III Written Notice, and the disciplinary demotion, transfer, and pay reduction.[5] The grievant has now requested administrative review of the hearing decision.

DISCUSSION

By statute, EDR has been given the power to establish the grievance procedure, promulgate rules for conducting grievance hearings, and "[r]ender final decisions . . . on all matters related to . . . procedural compliance with the grievance procedure."[6] If the hearing officer's exercise of authority is not in compliance with the grievance procedure, EDR does not award a decision in favor of either party; the sole remedy is that the hearing officer correct the noncompliance.[7]

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[1] Decision of Hearing Officer, Case No. 10759 ("Hearing Decision"), May 25, 2016, at 2; Agency Exhibit 2 at 2.
[2] Agency Exhibit 2 at 5-20.
[3] *Id.* at 5; *see* Hearing Decision at 2.
[4] Agency Exhibit 2 at 2-3; *see* Hearing Decision at 1.
[5] Hearing Decision at 1, 7.
[6] Va. Code §§ 2.2-1202.1(2), (3), (5).
[7] *See Grievance Procedure Manual* § 6.4(3).

Inconsistency with Agency Policy

In his request for administrative review, the grievant asserts that the hearing officer's decision is inconsistent with agency policy. He first argues that the hearing officer erred in sustaining the Group II Written Notice on the basis of one charge alone.[8] In support of that point, he asserts a hearing officer must find that an agency has met its burden with respect to all the charges on a Written Notice to sustain the disciplinary action, even if one charge alone is sufficient to warrant the level of disciplinary action taken. The grievant also argues, among other things, that the agency's interview and investigation process were not conducted in accordance with agency policy; that the initial Group III Written Notice was not completed in a manner consistent with agency policy; that the agency failed to meet timelines set forth in agency policy; that the agency failed to provide the grievant with a copy of the recorded interview as required under agency policy[9]; and that the agency did not show that the grievant's actions were "dishonest[]." The Director of DHRM has the sole authority to make a final determination on whether the hearing decision comports with policy.[10] Accordingly, the grievant's policy claims will not be discussed in this ruling.

Hearing Officer's Consideration of the Evidence

The grievant's request for administrative review essentially challenges the hearing officer's findings of fact and determinations based on the weight and credibility that he accorded to evidence presented and testimony given at the hearing. Hearing officers are authorized to make "findings of fact as to the material issues in the case"[11] and to determine the grievance based "on the material issues and grounds in the record for those findings."[12] Further, in cases involving discipline, the hearing officer reviews the evidence *de novo* to determine whether the cited actions constituted misconduct and whether there were mitigating circumstances to justify a reduction or removal of the disciplinary action, or aggravating circumstances to justify the disciplinary action.[13] Thus, in disciplinary actions the hearing officer has the authority to determine whether the agency has established by a preponderance of the evidence that the action taken was both warranted and appropriate under all the facts and circumstances.[14] Where the evidence conflicts or is subject to varying interpretations, hearing officers have the sole authority to weigh that evidence, determine the witnesses' credibility, and make findings of fact. As long as the hearing officer's findings are based upon evidence in the record and the material issues of

[8] *See* Hearing Decision at 3. The agency predicated the Group II Written Notice on four different allegations. The hearing officer discussed only one of the allegations in his hearing decision, finding that the grievant had engaged in the conduct charged and that it was sufficient to justify the Group II Written Notice.

[9] To the extent the grievant asserts that the agency failed to provide him with documents under the grievance procedure, there is no indication that the grievant requested an order from the hearing officer requiring production of the recorded interview. As such, there is no basis to find that the hearing officer either erred in not compelling production of the interview or in not drawing an adverse inference against the agency.

[10] Va. Code § 2.2-3006(A); Murray v. Stokes, 237 Va. 653, 378 S.E.2d 834 (1989).

[11] Va. Code § 2.2-3005.1(C).

[12] *Grievance Procedure Manual* § 5.9.

[13] *Rules for Conducting Grievance Hearings* § VI(B).

[14] *Grievance Procedure Manual* § 5.8.

the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.

Read broadly, the grievant's request for administrative review appears to challenge the hearing officer's finding that he failed to notify the agency that he "was the defendant in several civil actions . . . ."[15] In addition, the grievant also arguably challenges the hearing officer's findings that the grievant and his wife faxed a letter to the agency, in which the grievant's identity was camouflaged, complaining about the conduct of one of the grievant's subordinates; that the grievant initially denied this conduct; and that these actions were not consistent with the agency's "standards of honesty [and] integrity."[16]

EDR's review of the record evidence indicates that there was sufficient evidence to support the hearing officer's findings regarding the grievant's conduct. In particular, the record evidence shows that the grievant was the defendant in several civil actions and that the agency was not notified of his involvement in these actions.[17] In addition, there is record evidence that the grievant's wife, with his knowledge and in his presence, faxed a letter in which he purported to be a trooper (rather than the "new first sergeant") complaining about misconduct by a sergeant; that the grievant initially denied this conduct; that the grievant took this action in belief that the sergeant was the "ringleader" of complaints against him; and that the grievant admitted at hearing that the letter was a "mistake."[18] Because the hearing officer's findings are based upon evidence in the record and the material issues of the case, EDR cannot substitute its judgment for that of the hearing officer with respect to those findings.[19] Accordingly, EDR declines to disturb the decision on this basis.

Claim under the Fraud and Abuse Whistle Blower Protection Act

In his request for administrative review, the grievant also contends he is entitled to relief as a whistle blower under the Fraud and Abuse Whistle Blower Protection Act (the "Act").[20] The grievant asserts that his involvement in the faxed complaint about the sergeant constituted protected conduct under the Act.

The hearing officer determined that the grievant was not protected by the Act, as the grievant's disclosures regarding his subordinate were not made in good faith.[21] Section 2.2-3011(C) of the Act specifically limits the protection of the Act to employees who made

[15] Hearing Decision at 3.
[16] *Id.* at 6.
[17] *See, e.g.*, Agency Exhibit 4(D) at 2-3; Agency Exhibit 4(E) at 12-13, 17-18; Agency Exhibit 4(F) at 111-22.
[18] *See* Agency Exhibit E at 41-42; Agency Exhibit 4(F) at 30-39; Agency Exhibit 24; Hearing Recording at 4:54:40-4:55:17.
[19] The grievant argues that to the extent he engaged in the conduct charged by the agency, he did not act in bad faith and therefore the charges against him cannot be upheld. Whether the agency must show that the grievant acted in bad faith or with an improper intent is a matter of policy and is not subject to review by EDR. Similarly, regarding the grievant's allegations that the agency failed to comply with policy in conducting its investigation and disciplining the grievant, these are questions of policy that must be addressed, if at all, by the DHRM Director.
[20] Va. Code §§ 2.2-3009 to 2.2-3014.
[21] Hearing Decision at 7.

disclosures in good faith. In this case, there is record evidence that the faxed complaint misrepresented the grievant's identity, that it was made because the grievant believed the sergeant was a "ringleader" in the complaints about him, that the grievant was aware of the proper manner in which to address his concerns regarding the sergeant's conduct, and that the grievant, as the sergeant's supervisor, "had the ability and authority to correct the problems"[22] identified in the faxed complaint.[23] As the hearing officer concluded,

> This Act does not apply because Grievant's report was not made in good faith. Grievant was not a whistle blower under the Act. His objective was to cause harm to Sergeant T rather than correcting a problem he could have corrected [as First Sergeant].

Having reviewed the hearing record, EDR concludes that the hearing officer's conclusions regarding the grievant's lack of good faith are supported by record evidence.[24] There is no evidence that the hearing officer abused his discretion in finding that the grievant did not act in good faith and therefore did not enjoy protection under the Act.[25] As a result, EDR is unable to find any error under the grievance procedure. Accordingly, the decision will not be remanded on this basis.

Mitigation

The grievant's request for administrative review also arguably challenges the hearing officer's decision not to mitigate the agency's disciplinary action. By statute, hearing officers have the power and duty to "[r]eceive and consider evidence in mitigation or aggravation of any offense charged by an agency in accordance with rules established by [EDR]."[26] The *Rules for Conducting Grievance Hearings* ("*Rules*") provide that "a hearing officer is not a 'super-personnel officer'" and that "in providing any remedy, the hearing officer should give the appropriate level of deference to actions by agency management that are found to be consistent with law and policy."[27] More specifically, the *Rules* provide that in disciplinary grievances, if the hearing officer finds that:

> (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless, under the record evidence, the discipline exceeds the limits of reasonableness.[28]

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[22] Hearing Decision at 6.
[23] *See, e.g.*, Agency Exhibit E at 41-42; Agency Exhibit 4(F) at 30-39; Agency Exhibit 24; Hearing Recording at 4:54:40-4:55:17.
[24] *See, e.g.*, Agency Exhibit 4(E) at 8, 24-26, 41-42; Agency Exhibit 4(F) at 30-39.
[25] To the extent the ultimate determination of such an issue is a question of law, beyond the facts determined by the hearing officer, it is not within EDR's authority to address such a question with finality and is, therefore, potentially subject to review by the appropriate court in an appropriate appeal. *See* Va. Code § 2.2-3006(B).
[26] Va. Code § 2.2-3005(C)(6).
[27] *Rules for Conducting Grievance Hearings* § VI(A).
[28] *Id*. § VI(B)(1).

Thus, the issue of mitigation is only reached by a hearing officer if he or she first makes the three findings listed above. Further, if those findings are made, a hearing officer must uphold the discipline if it is within the limits of reasonableness.

Importantly, because reasonable persons may disagree over whether or to what extent discipline should be mitigated, a hearing officer may not simply substitute his or her judgment on the issue for that of agency management. Indeed, the "exceeds the limits of reasonableness" standard is a high standard to meet, and has been described in analogous Merit Systems Protection Board case law as one prohibiting interference with management's discretion unless under the facts the discipline imposed is viewed as unconscionably disproportionate, abusive, or totally unwarranted.[29] EDR will review a hearing officer's mitigation determination for abuse of discretion,[30] and will reverse only where the hearing officer clearly erred in applying the *Rules*' "exceeds the limits of reasonableness" standard. As with all affirmative defenses, the grievant has the burden to raise and establish any mitigating factors.[31]

Arguably, when an agency presents sufficient evidence to support the issuance of a Group III Written Notice, dismissal is inherently a reasonable outcome.[32] In this case, the agency chose to mitigate the disciplinary action from termination to a demotion with a transfer and reduction in salary. The hearing officer considered the grievant's potentially mitigating evidence and concluded that further mitigation was not warranted.

The grievant appears to assert, among other claims, that the disciplinary action should have been mitigated because other employees were treated more favorably. While inconsistent treatment between similarly situated employees can be a basis for mitigation, in this case, there is no evidence in the hearing record to show that other similarly situated employees engaged in similar conduct in comparable circumstances, were disciplined for multiple infractions, and received lesser punishment.[33] To the extent that the grievant argues that his length of service with otherwise satisfactory performance should have been considered as a mitigating factor, we

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[29] The Merit Systems Protection Board's approach to mitigation, while not binding on EDR, can be persuasive and instructive, serving as a useful model for EDR hearing officers. *E.g.*, EDR Ruling No. 2012-3102; EDR Ruling No. 2012-3040; EDR Ruling No. 2011-2992 (and authorities cited therein).

[30] "'Abuse of discretion' is synonymous with a failure to exercise a sound, reasonable, and legal discretion." Black's Law Dictionary 10 (6th ed. 1990). "It does not imply intentional wrong or bad faith . . . but means the clearly erroneous conclusion and judgment—one [that is] clearly against logic and effect of [the] facts . . . or against the reasonable and probable deductions to be drawn from the facts." *Id.*

[31] *Grievance Procedure Manual* § 5.8; *Rules for Conducting Grievance Hearings* § VI(B).

[32] Comparable case law from the Merit Systems Protection Board provides that "whether an imposed penalty is appropriate for the sustained charge(s) [is a] relevant consideration[] but not outcome determinative . . . ." Lewis v. Dep't of Veterans Affairs, 113 M.S.P.R. 657, 664 n.4 (2010).

[33] In particular, the grievant asserts that a sergeant received a Group III Written Notice for "discrimination, sexual harassment and hostile work environment," but there was no demotion or loss of pay. Given the lack of testimony at hearing regarding the disciplinary action taken against the sergeant, it is impossible for EDR to assess whether the circumstances in the two situations are sufficiently comparable to serve as a basis for mitigation. The limited record evidence regarding the sergeant is insufficient to determine whether the sergeant's conduct was, in fact, comparable to the grievant's and whether there were multiple sustained allegations in the sergeant's case, as there are in the grievant's.

find this argument unpersuasive. While it cannot be said that either length of service or otherwise satisfactory work performance are *never* relevant to a hearing officer's decision on mitigation, it will be an extraordinary case in which these factors could adequately support a hearing officer's finding that an agency's disciplinary action exceeded the limits of reasonableness.[34] The weight of an employee's length of service and past work performance will depend largely on the facts of each case, and will be influenced greatly by the extent, nature, and quality of the employee's service, and how it relates and compares to the seriousness of the conduct charged. The more serious the charges, the less significant length of service and otherwise satisfactory work performance become. In this case, neither the grievant's length of service nor his otherwise satisfactory work performance is so extraordinary as to justify mitigation of the agency's disciplinary action.

A hearing officer "will not freely substitute [his or her] judgment for that of the agency on the question of what is the best penalty, but will only 'assure that managerial judgment has been properly exercised within tolerable limits of reasonableness.'"[35] Even considering all of the arguments advanced by the grievant in his request for administrative review as ones that could reasonably support mitigating the discipline issued, EDR is unable to find that the hearing officer's determination regarding mitigation was in any way unreasonable or not based on the evidence in the record. As such, EDR will not disturb the hearing officer's decision on this basis.

CONCLUSION AND APPEAL RIGHTS

For the reasons stated above, EDR declines to disturb the hearing officer's decision.[36] Pursuant to Section 7.2(d) of the *Grievance Procedure Manual*, a hearing officer's original decision becomes a final hearing decision once all timely requests for administrative review have been decided.[37] Within 30 calendar days of a final hearing decision, either party may appeal the final decision to the circuit court in the jurisdiction in which the grievance arose.[38] Any such appeal must be based on the assertion that the final hearing decision is contradictory to law.[39]

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[34] *See, e.g.*, EDR Ruling No. 2013-3394; EDR Ruling No. 2010-2363; EDR Ruling No. 2008-1903; EDR Ruling 2007-1518.
[35] EDR Ruling No. 2014-3777 (quoting *Rules for Conducting Grievance Hearings* § VI(B)(1) n.22).
[36] To the extent this ruling does not address any issue raised by the grievant in her request for administrative review, EDR has thoroughly reviewed the record and has determined that any such issue is not material, in that it has no impact on the result in this case.
[37] *Grievance Procedure Manual* § 7.2(d).
[38] Va. Code § 2.2-3006(B); *Grievance Procedure Manual* § 7.3(a).
[39] *Id.*; *see also* Va. Dep't of State Police v. Barton, 39 Va. App. 439, 445, 573 S.E.2d 319, 322 (2002).